Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–762 OF 2002
GOPAL SRI RAM, RICHARD MALANJUM AND HASHIM YUSOFF JJCA
11 JULY 2005

Moneylenders — Loan of money — Advancement by shareholder — Whether loans caught by Moneylenders Act 1951 — Whether respondent carrying on business of money lending

The case for the respondent against the appellants was for the recovery of the sum of RM3,688,370.90 lent by the former to the first appellant and a further sum of RM1,822,276.44 lent to the second appellant over the period 1976 to 1982. During that period, the respondent was a shareholder of the appellants. The appellants were then financially straitened. Urgent cash was required from time to time to keep the appellants afloat. The respondent was creditworthy and furnished the cash by borrowing funds from its bankers. It charged the appellants interest on the monies advanced. Later, the shareholding of the appellants changed hands. The new shareholders put their board in place and the new board took the position that the appellants were not indebted to the respondent. At the trial, the appellants went forward on three defences, namely the respondent had failed to prove that any monies had indeed been advanced to the appellants, the respondent's claim was barred by limitation and the loans were irrecoverable because the respondent was an unlicensed moneylender. The trial judge rejected all three defences and entered judgment for the respondent. The Court of Appeal decided that the only issue with any need for consideration was the moneylending defence.

Held, dismissing the appeal:

(1) The real issue before the learned judge was the true nature of the relationship between the respondent and the appellants at the material time. And that relationship was one of a shareholder and his company. It was in its capacity as shareholder that the respondent advanced monies to the appellants. This was therefore not a case of the respondent carrying on the business of money lending on the facts. It is common place in the corporate environment for shareholders or directors of a company to advance it funds at interest to tide it over difficult periods of financial hardship. Such transactions are necessary for keeping companies in a position to meet their debts as and when they fall due. If the courts proceed to treat these transactions as pure money lending within the Moneylenders Act 1951 ('the 1951 Act'), then no shareholder or director will ever be able to recover genuine advances albeit bearing interest made to his or her company during a time of want (see para 5).

(2) The facts of the cases decided under s 3 of the 1951 Act were far different from the present. The 1951 Act, by its spirit and intendment was designed to protect individuals who because of their impoverishment were caught in the jaws of unlicensed lenders. It was certainly not designed to apply to fact patterns such as those that exist in the present instance. The loans made in the present case were not caught by the 1951 Act (see para 7).

[Bahasa Malaysia summary

Kes responden terhadap perayu-perayu adalah untuk mendapat balik sejumlah RM3,688,370.90 yang dipinjam oleh responden kepada perayu pertama dan sejumlah RM1,822,276.44 lagi yang dipinjam kepada perayu kedua untuk tempoh tahun 1976 hingga 1982. Sepanjang tempoh tersebut, responden merupakan pemegang saham perayu-perayu. Perayu-perayu kemudian berada dalam keadaan kewangan yang susah. Wang tunai segera diperlukan dari masa ke semasa untuk membantu perayu-perayu. Responden mempunyai kepercayaan kredit dan mendapatkan wang tunai dengan meminjam wang daripada pihak bank. Ia mengenakan caj faedah ke atas wang yang didahulukan kepada perayu-perayu. Berikutan itu, pemegangan saham perayu-perayu bertukar tangan. Pemegang-pemegang saham baru telah menubuhkan lembaga pengarah mereka dan lembaga tersebut memutuskan bahawa perayu-perayu tidak terhutang kepada responden. Semasa perbicaraan, perayu-perayu telah mengemukakan tiga pembelaan, iaitu responden telah gagal membuktikan terdapatnya apa-apa wang yang telah didahulukan kepada perayu-perayu, tuntutan responden telah terbatas oleh had masa dan pinjaman itu tidak boleh diperolehi balik kerana responden adalah pemberi pinjaman wang yang tidak berlesen. Hakim perbicaraan menolak ketiga-tiga pembelaan tersebut dan memasuki penghakiman menyebelahi responden. Mahkamah Rayuan memutuskan bahawa satu-satunya persoalan yang memerlukan pertimbangan adalah berhubung pembelaan pemberi pinjaman wang.

Diputuskan, menolak rayuan tersebut:

(1) Persoalan di hadapan hakim yang bijaksana adalah berhubung sifat sebenar hubungan antara responden dan perayu-perayu pada masa matan. Dan bahawa hubungan itu adalah antara pemegang saham dan syarikatnya. Responden adalah dalam kapasitinya sebagai pemegang saham semasa perayu-perayu mendahulukan wang kepada responden. Oleh demikian berdasarkan fakta, ini bukan satu kes di mana responden menjalankan perniagaan pemberi pinjaman wang. Adalah perkara biasa dalam dunia korporat untuk pemegang-pemegang saham atau pengarah-pengarah sebuah syarikat mendahulukan wang berserta faedah untuk membantu dalam keadaan mengalami masalah kewangan. Transaksi sedemikian adalah perlu untuk mengekalkan syarikat dalam suatu kedudukan untuk menangani hutang pada masa mengalami kesempitan wang. Jika mahkamah terus menganggap transaksi sedemikian sebagai pemberi pinjaman wang semata-mata menurut Akta Pemberipinjaman Wang 1951 ('Akta 1951'), maka tiada pemegang saham atau pengarah yang boleh mendapat balik pendahuluan tulen syarikatnya walaupun dengan faedah yang diberi kepada syarikatnya semasa keperluan itu berlaku (lihat perenggan 5).

(2) Fakta-fakta kes-kes yang diputuskan di bawah s 3 Akta 1951 tersebut adalah berbeza dengan sekarang. Akta 1951, melalui niat dan tujuannya digubal untuk melindungi individu yang mana disebabkan oleh kesempitan kewangan mereka terperangkap dengan pemberi pinjaman wang yang tidak berlesen. Ia sememangnya bukan digubal untuk digunakan dalam keadaan yang wujud dalam kes ini. Pinjaman yang dibuat dalam kes semasa tidak terikat oleh Akta 1951 (lihat perenggan 7).]

Notes

For cases on loan on money generally, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 502–503.

Cases referred to

Chow Yoong Hong v Choong Yah Rubber Manufactory [1962] MLJ 74 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)
T Chellapah v Official Assignee [1971] 1 MLJ 24

Legislation referred to

Moneylenders Act 1951 s 3

Appeal from: Civil Suit No 22–1–141 of 1991 (High Court, Pulau Pinang)

Ghazi Ishak (B Jeyasingam with him) (Ghazi & Lim) for the first appellant.
Karin Lim (Lim Hock Siang with her) (Presgrave & Matthews) for the second appellant.
Mahinder Singh Dulku (Wong Yee Chue with him) (Lim Kean Siew & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The case for the respondent (plaintiff in the court below) against the appellants (defendants in the court below) was for the recovery of the sum of RM3,688,370.90 lent by the former to the first appellant and a further sum of RM1,822,276.44 lent to the second appellant over the period 1976 to 1982. That case when expanded amounts to this.

[2] During this period, the respondent was a shareholder of the appellants. The appellants were then financially straitened. Urgent cash was required from time to time to keep the appellants afloat. The appellants' creditworthiness was in grave doubt. The respondent was creditworthy and furnished the cash by borrowing funds from its bankers. It charged the appellants interest on the monies advanced. Later, the shareholding of the appellants changed hands. The new shareholders put their board in place and the new board took the position that the appellants were not indebted to the respondent. At the trial the appellants went forward on three defences. First, that the respondent had failed to prove that any monies had indeed been advanced to the appellants. Second, that the respondent's claim was barred by limitation. Third, that the loans were irrecoverable because the respondent was an unlicensed moneylender. The trial judge rejected all three defences and entered judgment for the respondent. The appellants want that judgment reversed.

[3] Having very carefully read the record of appeal and having re-read it for the purpose of writing this reserved judgment I am entirely satisfied that the only issue with any need for consideration is the moneylending defence. The rejection by the learned judge of the first two defences depends on the findings of fact made by him. There is abundant material to show that the loans were indeed made and that there was absent a factual basis for the defence of limitation to succeed. Complaint was

made by learned counsel for each of the appellants that the trial judge was wrong in not drawing an adverse inference against the respondent for failing to call one Saw Eng Lock who was the managing director of each of the appellants at the material time, that is to say when the loans were made. He was the respondent's representative on the appellants' boards. But the respondent did call one Saw Cheow Lip (PW3) who was in charge of the appellants' financial matters during the relevant period. This witness whose credibility appears to have been confirmed by contemporary documentary evidence was rightly accepted by the trial judge and no criticism may fairly be made of this. Since the respondent who had accepted the risk of persuasion had succeeded in convincing the judge of the truthfulness of PW3, nothing turns on the failure to call Saw Eng Lock. It is not the law that a certain number of witnesses must be called by a party who carries the burden of proving his or her case. Quite the contrary. And we made that clear in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97.

[4] I now turn to the moneylending defence. There is no doubt that in respect of all the monies advanced to the appellants the respondent charged interest over and above the rate it had to pay its bankers. The learned trial judge nevertheless rejected this defence on the ground that the respondent did not carry on the business of moneylending. The judge relied on the judgment of Lord Devlin in the celebrated case of *Chow Yoong Hong v Choong Yah Rubber Manufactory* [1962] MLJ 74 where the learned Law Lord said:

> To lend money is not the same thing as to carry on the business of money-lending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions.

[5] Learned counsel for the second appellant says that the learned judge was wrong in taking the approach he did because the respondent's memorandum of association sets out one of its objects as that of money lending. With respect, we think that counsel has addressed the wrong target. The real issue before the learned judge was the true nature of the relationship between the respondent and the appellants at the material time. And that relationship was one of a shareholder and his company. It was in its capacity as shareholder that the respondent advanced monies to the appellants. This is therefore not a case of the respondent carrying on the business of money lending on the facts. It is commonplace in the corporate environment for shareholders or directors of a company to advance it funds at interest to tide it over difficult periods of financial hardship. Such transactions are necessary for keeping companies in a position to meet their debts as and when they fall due. If the courts proceed to treat these transactions as pure money lending within the Moneylenders Act 1951 ('the 1951 Act'), then no shareholder or director will ever be able to recover genuine advances albeit bearing interest made to his or her company during a time of want. Business in the corporate sector as we know it will come to a literal standstill and companies instead of looking to survival will face extinction.

[6] Now, I am entirely conscious of the line of cases where judges of great distinction have pronounced upon the interpretation to be given to s 3 of the 1951 Act. It suffices if I mention *T Chellapah v Official Assignee* [1971] 1 MLJ 24 where Suffian FJ said (at p 25):

The question here is, was the appellant a moneylender within the meaning of the Ordinance? If he was, then the decision of the official assignee was right. The Privy Council has pronounced on the effect of the presumption under section 3 (which does not exist in the equivalent English legislation) in *Chow Yoong Hong v Choong Yah Rubber Manufactory* [1962] MLJ 74 (PC). Delivering the advice of their Lordships, Lord Devlin said at p 77:

> The effect of [section 3] has been considered by Thomson J (as he then was) in *Sadhu Singh v Sellathurai* [1955] MLJ 117 in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of money lending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his money lending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence that there were sufficient other transactions of a similar sort to amount to a carrying on of business.
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> It will be seen that proof of a *single* loan made to the debtor at interest raised a presumption that there were sufficient other transactions of a similar sort to amount to a carrying on of the business of money lending by the appellant. (Emphasis added.).

[7] The facts of the cases decided under s 3 of the 1951 Act are far different from the present. In my judgment, the 1951 Act, by its spirit and intendment is designed to protect individuals who because of their impoverishment are caught in the jaws of unlicensed lenders. It was certainly not designed to apply to fact patterns such as those that exist in the present instance. I would therefore respectfully agree, albeit for slightly different reasons, with the learned judge on his finding that the loans made in the present case are not caught by the 1951 Act.

[8] There is no merit whatsoever in this appeal. I would accordingly dismiss it, affirm the orders of the court below and award the costs of this appeal to the respondent. The deposit shall be paid out to the respondent to account of its taxed costs.

[9] My learned brothers Richard Malanjum and Hashim Yusoff JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Peter Ling